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U. ROBERT SEAVER, CL

IN THE
Supreme Court of the United States

OCTOBER TERM 1970

~~No. 6860~~

70-5039

MARGARITA FUENTES,

Appellant,

v.

ROBERT L. SHEVIN, Attorney General for the
State of Florida, and FIRESTONE TIRE
AND RUBBER COMPANY,

Appellees.

BRIEF OF AMICI CURIAE

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Appellees.

BRIEF OF AMICI CURIAE

NATURE OF INTEREST

We submit this brief on behalf of General Motors Acceptance Corporation, Ford Motor Credit Company, Chrysler Credit Corporation, White Motor Corporation, Universal C.I.T. Credit Corporation, American Industrial Bankers Association, and The National Cash Register Company, as *amici curiae*, pursuant to written consent by all parties as filed previously with this Court.

General Motors Acceptance Corporation, Ford Motor Credit Company, Chrysler Credit Corporation and White Motor Corporation provide financing for distribution of new products to qualified franchised dealers of those goods and for retail installment sales of new and used products. They retain security interests in automobiles, trucks, farm equipment and similar products. Their dealer financing plans provide a valuable service without which their franchisees would find it difficult or impossible to stock products for sale at retail.

Universal C.I.T. Credit Corporation is engaged in almost every aspect of consumer and industrial sales financing and lending. It is the largest independent finance company in the United States and most of its lending and financial arrangements are secured by some form of personal property.

The American Industrial Bankers Association is a national trade association of sales finance companies, consumer finance companies, industrial banks and Morris Plan banks. Its members are broadly representative of the consumer sales finance and industrial banking industry throughout the United States.

The National Cash Register Company manufactures various types of business equipment and provides financing in connection with the sale of that equipment to qualified business enterprises. Its commercial financing is secured primarily by an interest in items such as cash registers, adding machines and similar business equipment.

In sum, these *amici* represent a broad cross-section of the Nation's creditors who make use of the statutes under attack in this case to aid effective consumer, commercial and business financing.

QUESTIONS PRESENTED

I

Does prehearing replevin, a widely used, historically approved provisional remedy authorized by a statute which provides for safeguards including hearing on the merits, achieve a permissible balancing of the interests of both creditor and debtor and of the state and thereby accord due process to all parties to a contract dispute?

II

Should this Court for the first time hold that entry of a home or place of business to take specific property held as security under a conditional sale contract on which there is probable cause to believe there has been a default violates the Fourth Amendment prohibition against unreasonable searches and seizures?

SUMMARY OF ARGUMENT

The Due Process Clause of the Fourteenth Amendment is a flexible instrument to make certain that the states deal with their citizens on a generally fair basis. It does not require adherence to a particular pattern but rather mandates procedures that maintain a balance of all legitimate interests and yet afford a reasonable opportunity to be heard prior to final adjudication or termination of a right.

Replevin as a provisional remedy has a long history of use. The common law has recognized and state legislatures have codified the right of persons to utilize self-help to recover wrongfully detained personal property. Self-help creates serious risk of violent altercations over the right to possession of property. Therefore, to maintain tranquillity the state uses its peace officers as a deterrent to violent resistance to repossession and as an incentive to the claimant to forego his right of self-help.

Striking down the Florida replevin statute will have several serious consequences. The courts of most of our states, like Florida, are not equipped to support the added time and expense required by an adversary hearing on notice before implementation of a provisional remedy. Prehearing replevin is an important tool in maintaining the security upon which creditors rely, and elimination of that remedy will have a telling effect on the power of those citizens who purchase goods on credit. The requirement of a hearing must result in increased costs to retail and wholesale creditors in terms of attorneys' fees, loss of goods, higher discount rates for commercial paper and increased bad debt losses.

Replevin and other similar provisional remedies to vindicate private rights in personal property have never been held by this Court violative of the Due Process Clause. This case involves replevin of particular specific chattels in which the debtor had freely and affirmatively given the creditor a security interest in return for immediate possession under a conditional sale.

Florida law, consistent with most other states, provides the debtor with an adequate and meaningful opportunity to be heard both with respect to the replevin itself and on the merits of the underlying claim by the creditor. During the pendency of the provisional remedy, replevin does not work the hardships on the debtor that caused this Court to strike down statutes permitting garnishment of a worker's wages. Furthermore, the remedy is used by those claiming rights to immediate possession in contexts totally alien to credit purchases by indigent persons. Viewed against demonstrated legitimate interests of the state, creditor and debtor, the Fourteenth Amendment does not require a hearing prior to replevin.

The repossession of goods under the Florida replevin statute does not amount to an unreasonable search and seizure proscribed by the Fourth Amendment. The Fourth Amendment grew out of a need for protection against abuse of general warrants and as a corollary to the self-incrimination privilege. Neither in England nor in the United States was the ban on unreasonable searches and seizures intended to be applied in civil actions for the recovery of debts. An unbroken line of precedents from this Court has made it clear that the Fourth Amendment does not apply in civil actions between private parties wherein an authorized peace officer conducts the recovery of possession of personal property.

Furthermore, the facts of this case make clear that in compliance with the Florida statutory scheme the repossession was reasonable and the requirements of a warrant were fulfilled. The parties had contracted that Appellee had the right to reclaim the goods upon default in payment. The entry and repossession were undertaken at a reasonable time and only after careful explanation of the situation to a representative of Appellant who allowed entry in the absence of any threat or coercion.

ARGUMENT

I

PREJUDGMENT REPLEVIN LEGITIMATELY SERVES A NUMBER OF NECESSARY COMMERCIAL FUNCTIONS.

In a wide variety of circumstances involving both private individuals and business enterprises the replevin remedy has given the holder of a security interest a useful and necessary device. Appellant and the Law Centers ignore the disparate uses of the remedy and unsupportedly assert that consumer

transactions form the usual setting for an action in replevin. *E.g.*, L.C. Br. 3, 7.¹ In fact the provisional remedy of replevin is used in a wide variety of contexts which present circumstances totally different from the stereotype of the inner-city indigent caught in the bind of overextension of credit, which Appellant claims represent the remedy's injustices.² In one of the three cases decided below in the companion action to this, *Epps v. Cortese*, 326 F. Supp. 127 (E.D. Pa.), *prob. juris. noted*, 402 U.S. 994 (1971), property was disputed between two divorced persons. *Morse v. Penzimer*, 58 Misc. 2d 156, 295 N.Y.S.2d 125 (Sup. Ct. 1968), concerned disputes over the interests of a decedent's estate in a truck, a boat and a motor. In *Goodbody & Co. v. Dodson*, 240 So. 2d 882 (Fla. Dist. Ct. App. 1970), the owner of securities held by a broker used this remedy to secure possession and later substantiated his claim at a trial on the merits.

Even in the consumer setting, the replevin statute is not the bogeyman Appellant and the Law Centers assert. Rather, the facility with which hardpressed and impecunious consumers, without ready access to substantial funds of their own, can afford to possess both necessities and amenities of life is the result of the ease with which they are granted credit. That ease of credit in turn arises out of the ability of the creditor to realize on his security. Ease of credit and reduction of bad debt losses "is in part a reflection of increasingly sophisticated and expensive collection techniques." Heinemann, *THE CRITICS OF CREDIT*, N.Y. Times, 8/11/71, p. 49 at 55 col. 1.

¹In this Brief citations to the Record are prefixed with "R.", to Appellant's Brief with "App. Br." and to the Brief of the National Consumer Law Center and Urban Law Institute as *Amici Curiae* with "L.C. Br.". Also, Appellee Firestone Tire and Rubber Company is referred to as "Appellee".

²In fact the remedy may be used by the state, *e.g.*, to recover license plates issued in consideration of a bad check. Op. Fla. Att'y Gen. 064-91 (1964).

Small businesses, including individual proprietorships and one-man corporations, make full use of the benefits of our credit economy. One of the *amici* herein, The National Cash Register Company, a supplier of accounting equipment to such small enterprises, had installment accounts receivable of \$111,752,000 as of December 31, 1970. Four of the *amici* are in the business of selling and financing the sale of those most portable chattels, the automobile and truck used commercially as well as privately.³ Aside from financing the retail sale of vehicles to consumers and to businesses, they give credit to their franchised dealers secured by inventory in stock. Smaller enterprises and neighborhood businesses would find it difficult or impossible to start up unless the purchase money installment credit system worked smoothly. Such entities lack the capital for a large down payment (NCR typically requires no more than 10%) and the sustained flow to service high interest rates.

Rather than conduct a thorough investigation of each credit applicant to be sure it is a viable enterprise and not a potential delinquent, most installment creditors find it more economical to rely on the security of the equipment sold and on collection efficiency in the event of default. Even in our complex society the result is easier credit and a greater opportunity to start a business, an opportunity which must be encouraged if our inner cities are to survive. One of those collection efficiencies is the ability to repossess reinforced by replevin statutes.

Indeed, in many instances the right to possession of a chattel would be rendered meaningless if the persons presently in possession could retain the property until a hearing on the merits. First, the very delay entailed in such proceed-

³For a statement of the difficult fact patterns that can be created, see *e.g.*, *Bank of Utica, Inc. v. Castle Ford, Inc.* 56 Misc. 2d 201, 288 N.Y.S.2d 297 (Sup. Ct. 1968).

ing can become a powerful motive to default without cause and continue in possession. In the case of perishables, including those goods which become obsolescent, the relief available after trial on the merits could well prove illusory. During the pendency of adversary hearings, for example, the secured goods could be purposely or negligently damaged, concealed, stolen, destroyed, removed from the state or sold to a bona fide purchaser.⁴ Further, neither Appellant nor the Law Centers take into account the use made of replevin to recover goods from abandoned, boarded, locked premises whose continued presence is an open invitation to theft. In most instances, the creditor could not be expected to know or, for that matter, to prove that his security interest was in jeopardy and the process of proving it may well result in the evil sought to be avoided. Appellant's suggestion, therefore, that the statute is unconstitutional because "it is not narrowly drawn to meet any unusual situation requiring extraordinary summary procedures" (App. Br. 14) is impractical.

Let it be clear that we are not arguing that the system lacks abuses. We are saying that any abuse should be treated with surgical precision, not by wholesale striking down of all replevin statutes. Finally, if the conditional sale contract and *ex parte* replevin are in the best interests of the general public unwise commercial devices, that is a matter of legislative, not constitutional, concern.

II

THE FLORIDA REPLEVIN STATUTE DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

⁴In *Dean Witter & Co. v. Bankers Trust Co.*, Sup. Ct. N.Y. County, Index No. 09327/71, and many similar actions *ex parte* writs of replevin have been used to seize stock certificates, securities, choses in action and commercial

- A. "Due Process of Law" Is a Dynamic Concept, Requiring a Process of Adjustment of the Various Interests of the Parties Concerned in the Light of History, Present Conditions and the Past Course of Decisions. It is Not an Absolute Bar to Proper Summary Process Suited to Society's Needs.

Appellant, in arguing that replevin statutes violate due process, suggests that in *every* provisional remedy there must be an evidentiary hearing prior to any seizure of property. The Due Process Clause has, however, never been held to require that notice and a hearing must be provided before the seizure of property in all cases. See *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Phillips v. Commissioner*, 283 U.S. 589, 596-97 (1931); *Coffin Bros. & Co. v. Bennett*, 277 U.S. 29, 31 (1928); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272 (1856). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961); *FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 275-76 (1949). Due process demands only that a reasonable opportunity to be heard and present defenses be provided "at a meaningful time and in a meaningful manner." *Armstrong, supra* at 552.

Thus, the term "due process of law" at the very least implies a weighing and balancing of the various interests of the state and its citizens in determining whether a particular procedural scheme satisfies rudimentary principles of fairness. That balancing process was spelled out by this Court in *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970):

paper in imminent danger of being taken from the jurisdiction. Similarly in *Simmons v. Williford*, 53 So. 452 (Fla. 1910), a claimant could use replevin to protect his interest in an orange crop about to be picked.

"The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."

In undertaking that task of "adjustment" of interests, this Court has been guided by several principles of analysis:

"'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances . . . [It] is compounded of history, reason, the past course of decisions . . ." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring).

The Florida replevin statute is fully consistent with each of these touchstones of "due process of law". Replevin statutes, enacted in almost all states, play a vital role in a wide variety of commercial transactions, derive from a long and unbroken history of use and represent a reasonable compromise among conflicting interests within the citizenry. It is our further belief that issues concerning their fairness warrant a case-by-case weighing of the relevant interests arising from specific factual contexts and that any holding of statutory invalidity should be confined to the particular fact pattern before this Court.⁵ There are manifold circumstances in which, we submit, prejudgment seizure without prior warning is vital and patently valid.

⁵As this Court recently stated in *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971): "Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question."

Appellant and the Law Centers seek to have Florida's replevin statute held unconstitutional on its face and in support of their position have produced a series of hypothetical factual situations not raised by this case. Yet this Court has held that one cannot attack the constitutionality of a statute on the ground that its application to another person may be unconstitutional. *Wyman v. James*, 400 U.S. 309, 326 (1971) ("facts of that kind present another case for another day"); *United States v. Raines*, 362 U.S. 17 (1960); *United States v. Wurzbach*, 280 U.S. 396 (1930); *Heald v. District of Columbia*, 259 U.S. 114 (1922); *Collins v. Texas*, 223 U.S. 288 (1912). In the companion case of *Parham v. Sears, Roebuck & Company*, No. 6966, the Commonwealth of Pennsylvania explicitly argues that the statute should be considered apart from the facts of the case. However, that has never been the rule in this Court. In *United States v. Raines*, *supra*, the principles that guide this Court in determining the constitutionality of any statute were clearly put forth:

"The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. This was made patent in the first case here exercising that power — 'the gravest and most delicate duty that this Court is called on to perform.' *Marbury v. Madison*, 1 Cranch 137, 177-180. This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate

a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." 362 U.S. at 20-21.

Neither *Coe v. Armour Fertilizer Works*, 237 U.S. 413 (1915), nor *Wuchter v. Pizzutti*, 276 U.S. 13 (1928), both cited by the Commonwealth, stand for the contrary rule. *Coe* involved a Florida statute which permitted a party who had obtained a judgment against a corporation to execute against property of a stockholder "to an extent equal in amount for so much as may remain unpaid upon their subscription to capital stock and no further" when there was no property of the corporation whereon to levy. There was no requirement in the statute that the stockholder be notified either before or after the levy. *Wuchter* involved the validity of a New Jersey statute which failed to require service of process on non-residents in civil actions for negligent operation of automobiles on its highways, although providing for service on the Secretary of State. In each case the aggrieved party received actual notice but did not appear. After judgment against him, he sued and this Court rejected the argument that receipt of actual notice rendered the statute constitutional as applied. The thing to note is that this Court did not rely on or utilize hypothetical situations to achieve its result. Only the facts presented and statutes involved were discussed. The important factor in each case was that the

notice was not required by statute, but rather the parties had through mere good fortune received notice. This Court in *Coe*, citing *Security Trust Co. v. Lexington*, 203 U.S. 323 (1906), explained that the question is not whether notice is received but whether notice is provided for by statute. The cases essentially turn on points of the law of jurisdiction and do not purport to consider "facts" *dehors* the record.

B. Interests of Creditors, Debtors and the State
Are Served by the Replevin Remedy.

The striking down of the Florida replevin statute will only injure the interests of both creditors and debtors. Business cannot or will not absorb the resulting additional cost in its profit margins. See Affidavit of Vincent G. Morgan, R. 50, 56.

Those additional costs to lenders include attorneys' fees for replevin hearings, disappearance of goods due to the absence of safeguards *pendente lite*, wear and tear on goods during pendency of replevin hearings, and greater discount rates on assignment of commercial paper and contractual rights due to additional costs of collection. Such potential wear and tear is adequately shown in this case: the tone of phonographic equipment customarily declines with increased usage and the stove was placed on an open porch exposing it to the elements. And it is common knowledge that the value of an automobile, mobile by nature and subject to an array of hazards, declines even more markedly with time and use; if the default is failure of the purchaser to provide required physical damage insurance, the total value of the collateral is at risk.

In addition, the remedy of replevin is also important to wholesale financing of dealer inventory. A dealer in possession of goods which he sells in the normal course of his business can pass title to those goods to his customers free

and clear of any security interest held by the inventory financier. *See* Fla. Stat. §679.307 (1969). The remedy of replevin is crucial at this point and allows the inventory financier to protect against additional loss by taking the collateral into his possession and preventing further sales to customers.

Experience of these *amici* dictate that any notice of an impending replevin results in destruction, removal or disappearance of the chattel in a high percentage of instances. The bill-collection demands which are made often and with some persistence prior to any replevin, serve only to notify the debtor that immediate action will be taken but apparently does not convince him, as the real and close threat of immediate repossession seems to do, to destroy, sell or secrete the security.

Indeed, "except for the very large concerns, most consumer lenders have suffered from depressed earnings in recent years and have encountered severe problems in raising new capital." Heinemann, *supra*. Increasing the costs of their bad debt losses and reducing their remedies will "naturally" result in "cutting back on the credit risks they assume" and "produce little real long-term benefit for consumers." *Id.*

Some finance companies, of course, will pass increased costs on to the low income consumer already purchasing on credit. To deny the creditor an adequate and practical remedy to repossess goods upon a debtor's default in payment may deny to the debtor his only means of obtaining many widely accepted or even necessary items, the enjoyment of which should not be reserved to the wealthy. *Epps v. Cortese, supra* at 136.

The low income consumer who purchases on credit but always timely makes his installment payments will have to bear the burden of the resulting increase in cost of credit. Also, because of the ten percent interest rate ceiling placed

on retail credit by Fla. Stat. §520.34(5) (1969), there is a distinct possibility that any increased costs of credit will force small retailers to cease extending credit. *See* Affidavit of Vincent G. Morgan, R. 51-55.

The state has vital interests which are furthered by the remedy of replevin. The first and most immediate state and public interest is the protection of the citizenry from violence growing out of exercise of undoubted rights of self-help. At common law, one entitled to possession may seize the chattel by non-violent self-help without notice or hearing. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS*, §22 (3d ed. 1964); 3 S. WILLISTON, *THE LAW GOVERNING SALES OF GOODS*, §579a (rev. ed. 1948). He could acquire by contract an irrevocable license to enter the buyer's premises and remove the property.⁶ The statutory replevin procedure thus makes possible the utilization of a peace officer to accomplish repossession whenever necessary to insure the public peace and to protect buyers, sellers and innocent bystanders. The

⁶*White Sewing Machine Co. v. Conner*, 111 Ky. 827, 64 S.W. 841 (1901); *McLeod v. Jones*, 105 Mass. 403 (1870); *North v. Williams*, 120 Pa. 109, 13 A. 723 (1888). In *McLeod v. Jones*, *supra* at 405, the court stated: "In other cases a right or license to enter upon land results or may be inferred from the contracts of the parties in relation to personalty. Permission to keep or the right to have one's personal property upon the land of another involves the right to enter for its removal." W. PROSSER, *HANDBOOK OF THE LAW OF TORTS*, §22 n. 41 (3d ed. 1964), thinks "such a license has been implied merely from the reservation of the right to repossess. *Heath v. Randall*, 1849, 4 Cush., Mass., 195; *Proctor v. Tilton*, 1889, 65 N.H. 3, 17 A. 638; *Blackford v. Neaves*, 1922, 23 Ariz. 501, 205 P. 587." There is also authority for the proposition that the secured party may enter the debtor's premises without such a clause. *See Goldberg v. List*, 11 Cal. 2d 389, 79 P.2d 1087 (1938); *Stowers Furniture Co. v. Brake*, 158 Ala. 639, 48 So. 89 (1908); *Richardson v. Anthony*, 12 Vt. 273 (1840). *See also Madden v. Brown*, 8 App. Div. 454, 40 N.Y.S. 714 (4th Dep't 1896). In adopting the Uniform Commercial Code, Florida has codified the common law rule that a secured party upon default has the right to take possession without judicial process if this can be done without breach of peace. *See* Fla. Stat. §679.503 (1969). A recent attack on the constitutionality of this statute has failed. *See McCormick v. First National Bank*, 332 F. Supp. 604 (S.D. Fla. 1971).

Law Centers turn this justification upside down in drawing the unwarranted inference from occasional incidents that prejudgment replevin is commonly accomplished by violence. *See* L.C. Br. 15.

A second important state interest in the continued existence of prehearing replevin is the conservation of state financial resources and the limitation of the number of evidentiary hearings required in a given litigation. *See Epps v. Cortese, supra*. In the Small Claims Court (jurisdiction under \$750) of Dade County, Florida, alone, there were at least 442 prejudgment replevin actions filed in the year 1969. (R. 22). During the year 1970 there were over 325 prejudgment replevin actions in the Civil Court of Record (jurisdiction over \$750 but under \$5,000). There is every reason to believe that these statistics will continue to increase since installment credit is inextricably related to, if not responsible for, our national consumption of consumer goods.

A further legitimate and overriding state and public interest in survival of replevin statutes is the protection of the purchasing power of the state's low income citizens. As the *Epps* court wrote:

"Additionally, the State and creditor interests coincide in providing a protective remedy for those who have retained title to or security interest in specific and unspecialized property by authorizing procedures designed to prevent destruction, misuse or concealment of property by the debtor pending final disposition. Adequate remedies made available to creditor interests are necessary to the preservation and continuation of retail credit upon which vast numbers of people must necessarily rely in a constantly inflated economy. To deny the creditor an adequate and practical remedy may deny the debtor of his only means of obtaining many widely accepted, but costly,

items, the enjoyment of which should not be reserved to the wealthy. The preservation of adequate remedies is also necessary to the maintenance of many large and small retail businesses without which our economy might well substantially decline to the detriment of the very individuals whom plaintiffs here seek to protect." 326 F. Supp. at 135-36.

We do not assert that the remedy is immunized from abuse. Abuse of commercial codes will continue so long as there are unscrupulous sellers and fraudulent purchasers. If there are abuses, however, their correction is (a) a matter for the states' enforcement agencies, (b) with legislation or litigation directed to the particular abuse. Declaring the remedy unconstitutional because of non-inherent abuses or misapplications is an overresponsive final remedy inappropriate to the stated ill. Further, there is no reason to believe that the states are not willing or capable of correcting the abuses, absent which they do not take on a constitutional dimension. *See* N.Y.C.P.L.R. §7102 (1971).

C. The Antiquity of the Replevin Remedy Imports a Presumption of Constitutionality.

Appellant challenges a remedy of ancient origin, legislated in England in 1267 by the Statute of Marlbridge, 52 Henry III, ch. 21. The action of replevin is designed to vindicate a claim of right to immediate possession of property that is wrongfully held by another. Originally it was used to prevent breaches of the peace by providing an effective alternative in the King's Courts to a resort to self-help by an aggrieved person with right of possession. 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 574-78 (2d ed. 1968).⁷ The rationale lay, not in real prop-

⁷Appellant's attempt to characterize prejudgment replevin as "historically anomalous" (App. Br. 15) falls wide of the mark. The original form

erty considerations, but in the necessity to allow the plaintiff to tend and use the animals on the disputed land. 2 BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 439-42 (Thorne trans. 1968). Actually the right of an attaching creditor to deprive the holder of property temporarily of its use without any prior judicial hearing reaches back into Roman times. 1 WADE, ATTACHMENT 19-22 (1886).

The constitutionality of provisions similar to those adopted in Florida has long been upheld as consistent with due process. In *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969), this Court stated that summary proceedings "may satisfy due process for attachments in general," *id.* at 340, citing an unbroken line of decisions holding that the states, in the course of regulating commercial relationships, were empowered to adopt statutes providing for the provisional recovery of a debtor's property — *Ownbey v. Morgan*, 256 U.S. 94 (1921); *Coffin Bros. & Co. v. Bennett*, 277 U.S. 29 (1928); and *McKay v. McInnes*, 279 U.S. 820 (1929), a per curiam affirmance based on *Ownbey* and *Coffin Bros.* Acknowledging the summary proceedings as time-honored remedies, this Court, in the two signed opinions, stated that the procedures were constitutional because they provided the defendant with an opportunity to assert

indeed arose in a context of the feudal tenure, but with the merging of various similar forms in this country has since well before the Constitution been used as in this case. "In England replevin was generally restricted to its proper field of testing the legality of a distress, but in America it was frequently used instead of detinue." T.F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 368-69 (5th ed. 1956). See, e.g. Mass. Stat. 1789, ch. 26. "The form of action was so useful that the action was extended to nearly all cases of unlawful caption or detention of chattels where it was sought to recover the chattels in specie." *Sinnott v. Feiock*, 165 N.Y. 444, 445-46, 59 N.E. 265 (1901), citing the 1788 New York statute simplifying the procedure. See also discussion by Judge Lurton in *Three States Lumber Co. v. Blanks*, 133 F. 479, 481-82 (6th Cir. 1904).

his defenses at a hearing subsequent to the attachment, and they were supported by valid state and creditor interests.⁸

A procedure established through long use, born in reason and uniformly accepted, although not immunized from constitutional attack, is presumptively constitutional. As Mr. Justice Holmes stated in *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922):

"The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it, as is well illustrated by *Ownbey v. Morgan*, 256 U.S. 94, 104, 112."

D. Constitutionality of the Florida Replevin Statute Is Not Governed by the Decision in *Sniadach*.

Appellants and the Law Centers rely principally on *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969), to assert that the replevin here involved was taking of property in contravention of the Fourteenth Amendment.⁹

⁸The procedures held constitutional by this Court in each of the three cases did not provide as adequate procedural safeguards as the Florida replevin statute. For example, in *McKay*, a general creditor could attach a chattel without posting any bond, security or other undertaking. And in *Ownbey*, non-resident individuals were required to post a bond before they were permitted to appear and defend their interest in the property.

⁹Appellant also cites *Goldberg v. Kelly*, 397 U.S. 254 (1970), in support of this claim. (E.g., App. Br. 9, 17). *Goldberg* logically followed from *Sniadach*, perhaps a fortiori, since the question concerned due process surrounding threatened termination of a governmental benefit, the fact finders need never have held a hearing and the countervailing state interest was regarded as a minimal extra fiscal and administrative burden. But most importantly, the property involved in *Goldberg* — welfare payments by the

In *Sniadach*, the court held unconstitutional a Wisconsin statute which permitted a creditor to garnish wages of an alleged debtor prior to any judicial hearing. That decision, far from "particularly controlling" (L.C. Br. 22) the outcome of this case, lacks any application to replevin.

In *Sniadach*, Justice Douglas stressed the sharp distinction between wage garnishment and provisional recovery of personal property:

"We deal here with wages — a specialized type of property presenting distinct problems in our economic system." 395 U.S. at 340.

That distinction, separating from all other types of personal property wages and direct substitutions for wages, has the virtue of certitude and simplicity. Certitude and simplicity, while not the only criteria to be considered, should weigh heavily in the decision of this case, which involves as it admittedly does hundreds of thousands of consumer and business transactions ranging from the very small to the quite substantial. Certitude also has jurisprudential benefits; rendering meaningless the strong term "specialized" and extending *Sniadach* to stoves or stereos can only result in a flood of subsequent interpretative litigation as commercial parties settle their disputes in court rather than by themselves.

Besides certitude, the *Sniadach* distinction between wages and all other personal property is sound.¹⁰ As this Court

state — is the same "specialized type of property" as wages but for the source. The hardships facing the welfare recipient whose payments have been terminated are perhaps greater than those facing one whose wages are garnished.

¹⁰We think the court in *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (N.D.N.Y. 1970), was in error in extending *Sniadach* to "other necessities for ordinary day-to-day living." *Id.* at 722. Appellant here finds such necessities to include a second stove and a stereo set and another court extended it in general to any replevin. *Blair v. Pitchess*, 96 Cal. Rptr. 42, 486 P.2d 1242 (1971) (involving a taxpayers' suit unrelated to any particular use of the claim and delivery replevin statute).

emphasized, the temporary freezing of wages creates hardships often difficult to overcome — hardships not encountered in the case of replevin or attachment. Garnishment can render the hard pressed wage earner in debt unable to meet other obligations and thereby generate further creditor action. Replevin, on the other hand, is limited to the particular chattel in which the claimant asserts a bargained for superior right to possession. Even temporary loss of a basic household item can hardly impose an economic hardship as great as garnishment of a debtor's earned wages. The evils encouraged by wage garnishment as a means of charging double or demanding "collection fees," 395 U.S. 341, are not applicable to replevin which is limited to the goods involved. Further, the bargain initially struck between debtor and creditor contemplated at least in general terms that the creditor retained a specific interest in goods with a right to repossess upon default, unlike wage garnishment which is not a subject of any underlying agreement but is applied to debts far removed from the existence of the wage.¹¹ It ill becomes Appellant to term "a bargained for right inherent in the nature of these contracts" those terms most favorable to her, App. Br. 17 and L.C. Br. 26, while rejecting as unconscionable and unbargained for terms which may be disadvantageous to her. L.C. Br. 38. In contrast, as the court below in *Epps v. Cortese, supra*, put it: "... the creditor here seeks specifically identifiable property to which he has reserved title and which he now seeks in order to prevent its loss, concealment or destruction." 326

¹¹The Law Centers appear to play both sides of this question. On the one hand they say the indigent consumer does not understand that he is contracting away constitutional rights (L.C. Br. 35-37) and on the other draw vivid pictures of the "familiar" sight of the sheriff and furniture company representative taking goods from the house of a defaulting debtor (L.C. Br. 15). We suggest that the latter scene represents the general understanding of consumers of all classes, that nonpayment of an installment contract may result in repossession as a contractual right.

F. Supp. at 133. See *Brunswick Corporation v. J&P, Inc.*, 424 F.2d 100, 105 (10th Cir. 1970); *Wheeler v. Adams Co.*, 322 F. Supp. 645-55 (D. Md. 1971).

Sniadach is distinguishable from the instant case on the basis of the creditor's interest in recovering the property. "[This] Court held that allowing a creditor with no special need to garnish the wages of an alleged debtor prior to a hearing violated the fourteenth amendment . . ." *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 113 (1969). The Note goes on to term any analogy between *Sniadach* and replevin situations "attenuated" and to acknowledge that "creditor claims that attachment is necessary to prevent fraudulent conveyances may be more relevant in this area." *Id.* at 117. Indeed, preservation of the bargained security is at the heart of the matter and provides the "countervailing" interest to "the temporary loss of the use of tangible goods [which] often may not be as harsh as the Court believed temporary loss of wages to be." *Id.* Extended beyond the ghetto consumer syndrome, the analogy to *Sniadach* loses any claim to credibility.

Wage garnishment presents serious collateral consequences not encountered in a replevin action. In *Sniadach*, this Court found that, because garnishment necessarily involves the debtor's employer in a legal proceeding, it jeopardizes the continuation of his employment. 395 U.S. at 340. Furthermore, garnishment drains a family's general income and savings and often results in imposing an unwarranted desire to settle the matter in order to mollify his employer. None of those prejudicial circumstances that led to this Court's decision in *Sniadach* occurs in the case of a provisional recovery of a chattel.

The other case from which the Law Centers derive comfort is *Boddie v. Connecticut*, 401 U.S. 371 (1971), which involved the relationship of the state to its citizenry but is

cited to make a point concerning rights among citizens. Those unable to pay court costs were denied any access to the courts for purposes of securing a divorce. The *Boddie* decision held specifically that "the State's refusal to admit these appellants to its courts, the sole means in Connecticut for obtaining a divorce, must be regarded as the equivalent of denying them an opportunity to be heard upon their claimed right to a dissolution of their marriages . . ." *Id.* at 380. Under the Florida procedure, meaningful hearing is explicitly given before final adjudication. Again, in *Boddie* the countervailing state interest was a modest fiscal burden, characterized by Justice Black in dissent as "practically nominal", (*Id.* at 390), whereas here there are countervailing considerations to the state and both parties.

Approval of the extension of *Sniadach* sought by Appellants and the Law Centers would require a drastic break with precedent. In fact, *Sniadach* itself represented a break with precedent. *The Supreme Court, 1968 Term, supra* at 144. But to extend that break to a case involving an even more ancient remedy widely used in divergent commercial situations should not be taken lightly. To argue, as Appellant and the Law Centers do, that *Sniadach* controls the outcome of this case is misleading and overlooks a serious, and we contend impassable, hurdle for Appellant's position.

E. The Florida Replevin Statute Reflects a Measured Response by the Legislature to a Practical Commercial Problem.

Replevin is available only as a limited procedure to facilitate determination of the right to possession of a chattel. In providing private individuals with this remedy, Florida like most other states has created a number of procedural safeguards to protect the defendant's interests. Before a writ is issued, a plaintiff must file a complaint stating that he is lawfully entitled to the property. The recovery cannot be

effected without the intervention of a public official who makes the replevy and also sees that the remedy is not abused. In fact, in this case, there is and can be no claim that the stereo and stove were taken other than by peaceful and even courteous means.

The plaintiff must also post a bond in an amount at least double the value of the chattel to protect the debtor by assuring collection of any damages incurred from the repossession. Moreover, the bond discourages frivolous and fraudulent claims. Of greater significance is the fact that the defendant need not await a decision on the merits but may regain the use of his property in the interim by posting a bond in the same amount as the plaintiff's.¹² The sheriff is required to hold the property for three days to give sufficient time to post the bond. Finally, the defendant is afforded a full opportunity to defend his interests on the merits; there is no finality to the initial dispossession.

Ownbey v. Morgan, 256 U.S. 94 (1921), is illustrative of this Court's recognition of the need for an *in rem* provisional remedy in a commercial context. In upholding the constitutionality of the statute, this Court stated:

"The due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice with every modern improvement, and with provision against every possible hardship that may befall. It restrains state action, whether legislative, executive, or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, including the right to be heard where liberty or property is at stake

¹²In view of Appellant's contention that premiums on bonds are more costly to debtors than creditors (App. Br. 22-24), we must note that the Record fails to indicate that Appellant made any attempt to secure a bond or that she could not afford a premium.

in judicial proceedings . . . A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the States as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law, even if it be taken with its ancient incident of requiring security from a defendant who after seizure of his property comes within the jurisdiction and seeks to interpose a defense." *Id.* at 110-11.

The prejudgment seizure of goods to protect the creditor claiming, generally by contract, a superior right to possession is a measured response to this practical commercial problem. The Florida replevin statute represents a studied effort by the Legislature to strike a fair balance between the needs of the commercial world and the right of a person in possession of a chattel to be protected against capricious harrassment. We believe they are fully consistent with long-standing notions of due process of law and that they rest upon a rational basis within the knowledge and experience of the enacting legislators.¹³

III

ENTRY BY A PUBLIC OFFICIAL UNDER THE AUTHORITY OF A STATE STATUTE FOR THE LIMITED PURPOSE OF RECOVERING PROPERTY SUBJECT TO A WRIT OF REPLEVIN DOES NOT CONSTITUTE AN UNREASONABLE SEARCH AND SEIZURE.

The Florida legislature has authorized a procedure in the nature of replevin for provisional recovery of personal property by a public officer acting on behalf of one claiming a

¹³See *United States v. Carolene Steel Products Co.*, 304 U.S. 144 (1938).

right to immediate possession. Entry is provided to make that procedure effective if the officer's demand for the property is refused. Fla. Stat. §78.10 (1969). Appellant contends that the entry sanctioned by the statute contravenes the Fourth Amendment as constituting an "unreasonable search and seizure". The case law, however, seems clear that the Fourth Amendment is inapplicable to such an entry, and, even if it were, the entry here was not "unreasonable" within the meaning of the amendment.

A. The Fourth Amendment Does Not Apply to an Entry by an Authorized Public Officer Solely to Recover Possession of Personal Property.

Commencing with the landmark decision in *Boyd v. United States*, 116 U.S. 616 (1886), this Court has consistently held that the ambit of the Fourth Amendment does not encompass forcible entries by authorized public officers solely to recover personal property on behalf of one claiming a superior right to immediate possession. This Court has uniformly maintained the distinction between lawful entries to vindicate the right of the owner or holder of superior claim to possession and on the other hand improper intrusions by government officers to search for violations of the law, whether civil or criminal.

That important distinction was explained in *Davis v. United States*, 328 U.S. 582 (1946), in which this Court upheld the right of the government, acting through federal agents, to enter and seize property to which the government had a right of immediate possession. Mr. Justice Douglas, speaking for the majority, wrote:

"The distinction is between property to which the Government is entitled to possession and property to which it is not. . . . The distinction has had important repercussions in the law. . . . For an owner of prop-

erty who seeks to take it from one who is unlawfully in possession has long been recognized to have greater leeway than he would have but for his right to possession. The claim of ownership will even justify a trespass and warrant steps otherwise unlawful." 328 U.S. at 590-91.

That distinction was well understood by the Framers of the Constitution.¹⁴ This Court in *Boyd* recognized that the practice which precipitated passage of the Fourth Amendment was the issuance of general warrants and writs of assistance to British colonial officers to aid in enforcement of revenue laws. 116 U.S. at 624-30; Note, *Search and Seizure in the Supreme Court*, 28 U. CHI. L. REV. 664, 678-79 (1961). Searches pursuant to those instruments were virtually unlimited in scope and, as a practical matter, did not differ significantly from a general search without any formal authorization.¹⁵ To prevent similar abuses of governmental power, the authors of the Bill of Rights not only prohibited "unreasonable searches and seizures" but further established requirements for a warrant.

¹⁴In considering the applicability of the Fourth Amendment to this case, account must be taken of the amendment's historical development. As Chief Justice Taft stated in *Carroll v. United States*, 267 U.S. 132 (1925), "the Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." 267 U.S. at 149. See *Harris v. United States*, 151 F.2d 837, 839 (10th Cir. 1945), *aff'd*, 331 U.S. 145 (1947).

¹⁵As Justice Bradley wrote in *Boyd*:

"The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the liberty, of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. . . .

Since such common law writs¹⁶ were in use when the amendment was adopted and continued thereafter, *see supra* at 17-18, the necessary conclusion is that the Fourth Amendment was never meant to apply to them. Statutes such as those of Massachusetts and New York, *supra*, were left undisturbed, as the Framers intended.

This Court's interpretation has been consistent with that intention. In *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272 (1856), the government's use of a distress warrant, issued without the support of an oath or affirmation was upheld as part of a summary process for collecting debts due the government. This Court rejected the contention that the warrant violated the Fourth Amendment:

"But this article has no reference to civil proceedings for the recovery of debts, of which a search warrant is not made part. The process, in this case, is termed, in the act of congress, a warrant of distress. The name bestowed upon it cannot affect its constitutional validity. In substance, it is an extent authorizing a levy for the satisfaction of a debt; and as no other

"These things, and the events which took place in England immediately following the argument about writs of assistance in Boston, were fresh in the memories of those who achieved our independence and established our form of government. . . . Prominent and principal among [the abuses] was the practice of issuing general warrants by the Secretary of State, for searching private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of [criminal] libel." 116 U.S. at 625-26.

¹⁶The writ of replevin, as previously stated, was designed to vindicate the owner's right to property unlawfully held by another without compelling him to resort to self-help. 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 574-75 (2d ed. 1968). Other writs, such as attachment, sequestration and execution, were similarly developed to provide creditors with flexible methods of seizing property in satisfaction of a debt.

authority is conferred, to make searches or seizures, than is ordinarily embraced in every execution issued upon a recognizance, or a stipulation in the admiralty, we are of opinion it was not invalid for this cause." 18 How. at 285-86.

See also *Mason v. Rollins*, 16 F. Cas. 1061 (No. 9,252) (N.D. Ill. 1869). Corwin properly cites *Murray's Lessee* to show that this Court has affirmatively held the Fourth Amendment inapplicable to debt collections. E. CORWIN, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 823 (1952).

The distinction between a general search and the more limited intrusion by common law writs was later explored in *Boyd*. There this Court concluded that entries by public officers pursuant to those writs were not prohibited either by the Bill of Rights or by the Constitution itself:

"The entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a sequestration or an execution, is not within the prohibition of the Fourth or Fifth Amendment or any other clause of the Constitution . . ." 116 U.S. at 624.

As the Law Centers note, *Boyd* followed from *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765), but their explanation of those cases does not bear scrutiny. The material quoted from *Boyd* denouncing "all invasions" (L.C. Br. 27, their emphasis) was not directed at all entries of home or premises, but concerned only those invasions for government purposes. The extremely close tie between the Fourth and Fifth Amendments in *Boyd* and between seizures and self-incrimination in *Entick* drives the point home sharply. *Entick* itself was concerned directly with "general warrants which permitted the widest discretion to petty officials.

These general warrants soon became common in proceedings for seditious libel against printers and authors." Fraenkel, *Concerning Searches and Seizures*, 34 Harv. L. Rev. 361, 364-65 (1921).

Subsequent decisions have reaffirmed this Court's conclusion in *Murray's Lessee* and in *Boyd*. In *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 301-02 (1907), this Court dismissed an objection to the admission of certain evidence allegedly illegally seized by a federal marshal who acted under a writ of replevin. Cf. *Weeks v. United States*, 232 U.S. 383, 397 (1914). See also *United States v. 935 Cases More or Less*, 136 F.2d 523, 526 (6th Cir.), cert. denied, 320 U.S. 778 (1943); *United States v. Eighteen Cases of Tuna Fish*, 5 F.2d 979 (W.D. Va. 1925); *State v. Pope*, 4 Wash. 2d 394, 103 P.2d 1089 (1940).

That conclusion is consistent not only with the history and interpretation of the Fourth Amendment but also with the common law exceptions to the action of trespass. Common law has long authorized summary seizure of personal property by a private individual claiming a right to immediate possession. In a purely civil context an owner of personal property was deemed to have an implied license to enter upon the land of another and recover property improperly detained provided that he did not use unnecessary force. See *supra* at 15. It would be an incongruous and unfortunate result to permit an individual to enter upon another's premises to seize property but prohibit a state official from doing so, when the official's presence will undeniably limit the chances of violence.

Appellant and the Law Centers cite *Camara v. Municipal Court*, 387 U.S. 523 (1967), to support a contrary result.¹⁷ They claim that *Camara* held the Fourth Amend-

¹⁷The companion case of *See v. City of Seattle*, 387 U.S. 541 (1967), for our purposes involves the same issues; the only difference is that it deals with commercial property instead of a home.

ment applicable "to a criminal or civil proceeding", L.C. Br. 27, then assume this case is a civil proceeding and accordingly apply it to condemn replevin procedures. L.C. Br. 27-34. *Camara* indeed was the first case extending the Fourth Amendment protection to individuals subject to governmental searches who were not accused of any crime, overruling *Frank v. Maryland*, 359 U.S. 360 (1959). But this Court had no need to, and did not, overrule *Murray's Lessee* or the *Boyd* language quoted above, for it was not concerned with entry of premises to vindicate private, contractually obtained rights to possession. Therein lies the distinction between the ancient replevin remedies in use contemporaneously with adoption of the Fourth Amendment and general governmental searches in *Frank* and *Camara*. Replevin writs are not governmentally inspired searches, but vindications of purely private rights. The attempt to draw distinctions between civil and criminal proceedings, as the Law Centers do (L.C. Br. 27), is not relevant here.¹⁸

- B. Even if the Entry by Authority of Section 78.10 Were a "Search and Seizure" under the Fourth Amendment, the Procedures Prescribed by That Statute Are Not "Unreasonable".

Only *unreasonable* searches and seizures are prohibited by the Fourth Amendment. *Wyman v. James*, 400 U.S. 309 (1971); *Terry v. Ohio*, 392 U.S. 1, 9 (1968); *Elkins v. United States*, 364 U.S. 206, 222 (1960). Reasonableness varies with the circumstances of the search. See *Henry v. United States*, 361 U.S. 98 (1959); *Brinegar v. United States*, 338 U.S. 160 (1949). We believe the Florida legis-

¹⁸It was indeed acceptance of the same erroneous division of all litigation into civil and criminal that led the California Supreme Court to what we believe is an erroneous result in *Blair v. Pitchess*, *supra*, 486 P.2d at 1251.

lature, like most others, has so constructed its replevin statute that, as a matter of fact, the Fourth Amendment test of reasonableness is met.

Section 78.10 does not authorize a sheriff to make a general search or to rummage through the debtor's effects. Before the sheriff may take any action, the plaintiff's complaint must "describe" the property to be recovered, state that it is in the possession of the defendant and that it is wrongfully held by him. Fla. Stat. §78.10 (1969). Furthermore, before replevin the sheriff is required by §78.10 publicly to demand delivery of the property. Thus, the statute insures that the entry is limited solely to recovery of a previously identified piece of property wrongfully detained from the plaintiff. In *Camara* and *See* there were no such protections.

Indeed, the prerequisites for forcible entry by a sheriff under §78.10 are substantially the same as those for the issuance of a search warrant under the Fourth Amendment pursuant to which a warrant shall not issue but upon probable cause:

1. "supported by oath or affirmation,
2. "and particularly describing the place to be searched,
3. "and the . . . things to be seized."

Since the warrant requirements are fulfilled and since there is nothing talismanic in the word "warrant," action of the sheriff is reasonable under the Fourth Amendment. To require the sheriff also to obtain a warrant will only duplicate efforts and unduly burden our judicial system with no attendant benefit. As Justice Clark so aptly expressed in his dissent in *See v. City of Seattle*, 387 U.S. at 541, 554 (1967):

"I ask: Why go through such an exercise, such a pretense? As the same essentials are being followed un-

der the present procedures, I ask: Why the ceremony, the delay, the expense, the abuse of the search warrant? In my view this will not only destroy its integrity but will degrade the magistrate issuing them and soon bring disrepute not only upon the practice but upon the judicial process. It will be very costly to the city in paperwork incident to the issuance of the paper warrants, in loss of time of inspectors and waste of the time of magistrates and will result in more annoyance to the public."

In *Camara*, this Court described the ill effects of the entry as follows:

"[1] the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises,

[2] no way of knowing the lawful limits of the inspector's power to search, and

[3] no way of knowing whether the inspector himself is acting under proper authorization." 387 U.S. at 532.

In this case the debtor knows that upon default and failure to return the property the contract he has signed permits entry of his premises to recover that property.¹⁹ The

¹⁹As the lower court found, the critical clause in the contract between the parties is the one providing: "[I]n the event of default of any payment or payments, Seller at its option may take back the merchandise . . ." Stipulation of Facts, Exhibit B, R. 288. Appellant and the Law Centers contend there was no notice of such remedy. L.C. Br. 38-42. Requiring attention to be brought to that clause or that it be printed in bold red type, or whatever, are not safeguards of constitutional dimensions, even if they may be desirable. Further the country's poor (even if only in a general context) know that failure to pay means repossession. L.C. Br. 15.

requirement that the sheriff publicly demand delivery of the property limits his power to search. Finally, the debtor knows the sheriff is "acting under proper authorization" pursuant to the terms of the contract in helping the seller recover the merchandise.

Furthermore, under the facts of this case, the actual seizure of the stove and stereo set was not "unreasonable". As the Record indicates, the Deputy Sheriff executing the writ arrived at Appellant's residence at five o'clock on a weekday afternoon. The Deputy knocked on Appellant's door, identified himself, attempted to explain his presence, and did not proceed further until a language barrier was overcome. At the request of Appellant, the Deputy waited until the arrival of her son-in-law who was bi-lingual. The Deputy explained the effect of the writ to the son-in-law who thereupon permitted the Deputy to enter, indicated to him the precise location of the merchandise to be recovered and, without objection or protest by Appellant, allowed the repossession to take place. R. 28, 86. Thus, the facts before this Court cannot support Appellant's claim that the search was "unreasonable".

CONCLUSION

The Florida replevin statute comports with the requirements of the Due Process Clause of the Fourteenth Amendment. Furthermore, the entry by the state official for the limited purpose of recovering property did not constitute an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments. Appellant's attempt to have nullified this well-used and time-honored remedy of creditors in commercial and private transactions should be rejected. The decision of the three-judge court below should be affirmed.

September 15, 1971

Respectfully submitted,

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